



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: SEPTEMBER 29, 2022

IN THE MATTER OF:

Appeal Board No. 603663

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determination (June 5, 2018) holding GrubHub Holdings, Inc. (hereafter "employer" or "GrubHub") liable for tax contributions effective 1st quarter 2015 based on the independent contractor misclassification of FR (hereafter "claimant") and any other individual similarly employed as a delivery driver deemed to be in covered employment. (Appeal Board No. 603663 and)

The Department of Labor deemed the claimant to be an employee with credited remuneration from the employer regarding the claim for benefits effective February 12, 2018. (Appeal Board No. 603662 and 118-05476)

Requesting a hearing, the employer contends that the claimant and all other individuals similarly employed performed services as independent contractors.

The Administrative Law Judge held a combined telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant, and on behalf of the employer and of the Commissioner of Labor. By combined decisions filed October 15, 2018, the Judge overruled the initial determination of liability and sustained the employer's objection.

The Commissioner of Labor appealed the Judge's decisions to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the Commissioner of Labor and of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: GrubHub owns and operates an online marketing platform that connects dining customers to restaurants. Restaurants contract with and pay GrubHub for customers to access the restaurants via the platform to purchase food and to have that food delivered from the restaurant to the customer by delivery drivers engaged by GrubHub. Through GrubHub's platform, customers order and prepay for the food and drinks, and prepay the delivery fee and any gratuity.

GrubHub recruits potential drivers through referrals and online advertisements, which directs job seekers to its website that provides information about deliveries and a link to apply to be a driver. Through GrubHub's website, interested individuals submit their contact information, vehicle insurance, driver's license information, and the preferred geographic territory or market. GrubHub validates the drivers' licenses and automobile insurance. GrubHub engaged a third-party (Checkr) to perform background checks on all drivers. GrubHub also conducted background checks on drivers every six months. If the background check showed "egregious" past conduct, such as violence, theft, or DWI, such individuals are not engaged as delivery drivers.

GrubHub required drivers to execute the GrubHub Delivery Partner Agreement that provides, in part, the following:

- * The driver must be at least 19 years old, have had a valid driver's license for at least 2 years, and have his own vehicle and automobile insurance coverage; and GrubHub reserves the right to be listed as an additional insured [para 2.a.]

- * GrubHub may conduct periodic background and motor vehicle report checks [§ 2.c.]

- * The driver must use GrubHub's proprietary mobile application (the "Driver App"), and the driver must consent to any Driver App terms of use applicable at the time [§ 3]

- * The driver must provide GrubHub the driver's geo-location information, which may be monitored and tracked by GrubHub and shared with third parties [§ 3.a.]

- * The driver must "faithfully and diligently devote best efforts, skills and

abilities to the performance of Delivery Services in a professional manner", including to agree with the following: [§ 4.a.]

- o To be located within a reasonable distance of delivery restaurants
 - o To pick up and deliver orders in a timely manner
 - o To comply with reasonable identification or other requirements of the restaurant

 - o To follow reasonable delivery instructions from the customer
 - o To promptly notify GrubHub of any issues
 - o To use the Driver App to communicate order status with restaurants and/or customers, including acceptance of order, arrival at restaurant, receipt of food, and completion of delivery

 - o To perform deliveries in a safe manner and in compliance with all applicable traffic laws, regulations, and guidelines

 - o To maintain and utilize a motor vehicle or bicycle
 - o To maintain and utilize a data-enabled smartphone with a data plan, which smartphone is not jailbroken (iPhone) or rooted (Android), or otherwise altered to circumvent requirements or processes of the Driver App

 - o To maintain and utilize for delivery the insulated delivery bags ("hot bags")

 - o To maintain a professional appearance
- * GrubHub will not pay drivers for any Service Fees or other payments associated with orders not completed in material compliance with the paragraph 4.a. [§ 4.b.]

* GrubHub permits the use of subcontractors [§ 4.c.]

* GrubHub does not restrict drivers from working concurrently for competitors, but the driver must not divert or attempt to divert any GrubHub restaurants or customers to a competitor or directly to the driver [§ 4.d.]

* The driver will retain all gratuities given by the customer; the driver will be paid only the Service Fees that will be reported annually on the IRS Form 1099; and the driver shall be solely responsible for all costs and expenses arising from delivery services [§ 5.]

- * The driver must not disclose and exchange confidential and proprietary information regarding GrubHub's operation or its customers [§ 10.a.]
- * The driver must not violate any applicable law or regulation in connection with the performance of Delivery Services [§ 11.a.]
- * The driver must not participate in any action or omission negatively impacting GrubHub's reputation or relationship with restaurants or customers using the Platform (including rude, obscene, negligent or otherwise unprofessional conduct) while performing Delivery Services [§ 11.a.]
- * The driver must not participate in any action or omission threatening the safety (e.g., reckless driving or biking, threats or aggression, stalking and/or contacting individuals without permission) of any driver, restaurant personnel, or customer [§ 11.a.]
- * The driver must not be under the influence of illegal substances or alcohol while performing Delivery Services [§ 11.a.]
- * GrubHub may change or restrict access to the Driver App, either temporarily or permanently, if the driver is or is reasonably suspected of being in breach of this Agreement [§ 11.a.]
- * In the event any of the driver's representations and warranties cease to be true ("Ineligibility"), GrubHub may immediately suspend the driver's access to the Driver App, and GrubHub may terminate this Delivery Partner Agreement if such Ineligibility is not cured or is not capable of cure [§ 2.d.]

Drivers are permitted to use their own required hot bags or lease hot bags from GrubHub for \$5 per month. GrubHub permitted drivers to join its marketing campaign where drivers wore GrubHub's apparel (e.g., shirt and hat bearing GrubHub's logo) in lieu of a lease fee for GrubHub's hot bags.

From about the end of 2014, GrubHub conducted an optional in-person onboarding session at its GrubHub office in New York City to provide information about working as a delivery driver, including how to use the Driver App and how to treat customers. From about the middle of 2017, GrubHub stopped the in-person orientation sessions and provided the same information through online videos for drivers to review. GrubHub mailed out to the driver their gear, e.g., GrubHub hot bags and apparel. GrubHub emailed to the driver an electronic link

in order to download on their smartphones GrubHub's Driver App to start performing deliveries.

The drivers created and logged in with their own credentials and marked themselves available to accept deliveries (trip offers) in their chosen geographic market. Drivers could request GrubHub to change their market. When a customer ordered food on the platform, it offered the delivery to the closest available driver. The driver accepts a trip offer by pressing the accept button on the Driver App. A trip offer displayed, among other things, a Google map screen showing the restaurant and the customer location, the restaurant name and address, the ordered items, the estimated time of arrival (ETA) to pick up food, the ETA to deliver food, the customer's address and contact number, and the driver's delivery fee. The platform also provided the customer with an estimated delivery time. At the restaurant, the driver pressed a button on the Driver App denoting he has arrived. The Driver App suggest a route from the restaurant to the customer. At the customer's location, the driver pressed a button on the Driver App denoting he has arrived. Upon completing the delivery, the driver pressed a button on the Driver App denoting completion. Drivers accepted or declined deliveries without consequence. If an offer is rejected, the platform sends the delivery offer to the next closest driver.

To secure coverage during certain times of the day, GrubHub offered guaranteed minimum earnings during set blocks of time (e.g., one hour) if the driver signed up, remained available, and accepted all offers during the entire block. For example, if a driver signed up for an hour block with a \$11 minimum guarantee, and the driver earned only \$5 during that block, GrubHub paid the driver a "true-up" payment of \$6 to meet the minimum guarantee. If the driver earned over the minimum during the block, no true-up payment is issued. A driver may drop any signed-up block without consequence. A driver gets more trip offers by signing up for blocks as compared to merely being available without a block. If sufficient coverage was available, GrubHub withheld blocks from drivers.

Customers may make complaints regarding deliveries to the drivers and/or to GrubHub.

If a driver is late to pick up a food order at a restaurant, GrubHub may investigate and ultimately remove the driver and find a substitute driver to pick up the order. GrubHub investigates customer complaints by speaking to the

drivers and restaurants. If the driver left behind an item and had to return to the restaurant to deliver that item to the customer, the driver is not paid an additional fee. During an investigation, GrubHub may suspend the driver's application and not offer deliveries to the driver. GrubHub may offer the complaining customer a credit of \$5-\$10. When the customer's address was incorrect, the driver called the customer for address verification and GrubHub occasionally made an additional payment for mileage.

The claimant viewed a Craigslist advertisement stating that GrubHub needed delivery drivers and that they would earn about \$15 per hour. He then completed GrubHub's online application to be a delivery driver. On February 17, 2017, the claimant signed the GrubHub Delivery Partner Agreement. The claimant participated in the in-person onboarding orientation at the New York City office. He filled out an application, provided vehicle related information, and signed documents. The claimant joined GrubHub's marketing campaign in lieu of a lease fee for the two hot bags he received. He usually wore GrubHub's hat with no repercussion.

In April 2017, the claimant completed his first delivery in New York City. In or about May 2017, the claimant moved to the Albany NY area and requested GrubHub to change his geographic market. In or about June 2017, he continued to perform GrubHub deliveries. From about February through August 2018, the claimant did not perform any deliveries because his motor vehicle was not working. Since April 2017 through about the date of the hearing, the claimant rejected approximately 60% of the initial trip offers, he requested and GrubHub removed about 880 accepted orders, and he dropped about 220 of the 650 true-up blocks signed up to perform.

In the Albany NY market, the claimant was paid a delivery service fee of about \$3.50 per delivery plus \$0.50 per mile. GrubHub determined the mileage by drawing a straight line (as the crow flies) from the restaurant's location to the customer's location. Any gratuity was passed along to the claimant. He worked approximately 30 to 40 hours per week and earned about \$400 to \$600 per week. GrubHub paid the claimant via direct deposit in his personal capacity with no withholdings deducted from his earnings. GrubHub issued to claimant the IRS Form 1099.

OPINION: The evidence establishes that GrubHub exercised or reserved the right to exercise sufficient supervision, direction, or control over the claimant and other similarly situated drivers. Significantly, GrubHub screened drivers

and provided them with an in-person orientation and/or video presentation that included how to treat customers; GrubHub required drivers to use its Driver App and to not circumvent the geo-location information to accurately track and monitor their location; GrubHub provided and required the use of hot bags; GrubHub chose the drivers, set their pay and mileage reimbursement, and offered them financial incentives to work; GrubHub handled all the collections and payments; GrubHub fielded and investigated complaints; and GrubHub prohibited drivers from diverting restaurants or customers to a competitor or to the driver directly.

The cases cited by GrubHub are not controlling or otherwise significantly distinguishable considering the decision in *Matter of Vega (Postmates Inc.)*, 35 NY3d 131 (2020), rev'g 162 AD3d 1337 (3d Dept 2018), where the Court of Appeals found an employment relationship between the drivers and Postmates, based, in part, on the fact that Postmates controlled which couriers had access to possible delivery jobs, would find a replacement courier when needed, and unilaterally set the rate of compensation. As the Court wrote, "[t]hat the couriers retain some independence to choose their work schedule and delivery route does not mean that they have actual control over their work or the service Postmates provides its customers; indeed, there is substantial evidence for the Board's conclusion that Postmates dominates the significant aspects of its couriers' work by dictating to which customers they can deliver, where to deliver the requested items, effectively limiting the time frame for delivery and controlling all aspects of pricing and payment" (*Vega*, supra at 139). The Court

also reaffirmed the holding in *Matter of Rivera*, 69 NY2d 670 (1986), noting that "[a]lthough the operative technology has changed in the interim decades, this case is indistinguishable from *Matter of Rivera*, where we held that substantial evidence supported the Board's conclusion that a similar delivery person was an employee of the delivery company-even though he set his own delivery routes and did not have a set work schedule but called the company's dispatcher whenever he wished to engage in work, accepting only the jobs he desired" (*Vega*, supra at 139).

This case is also similar to delivery drivers held to be employees in *Matter of Hossain (Groundanywhere LLC)*, 205 AD3d 1282 (3d Dept 2022); and *Matter of Lowry (Uber Tech., Inc.)*, 189 AD3d 1863 (3d Dept 2020). See also *Matter of Ramlall (Medical Delivery Servs.)*, 182 AD3d 960 (3d Dept 2020); *Matter of Garbowski (Dynamex Operations East Inc.)*, 136 AD3d 1079 (3d Dept 2016); and

Matter of Gill (Strategic Delivery Solutions LLC), 134 AD3d 1362 (3d Dept 2015).

Under the totality of the circumstances, the Board holds GrubHub liable for tax contributions based on the remuneration paid to the claimant and all other delivery drivers similarly situated as covered employees for purposes of unemployment insurance.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, holding GrubHub Holdings, Inc. liable for tax contributions effective 1st quarter 2015 based on the independent contractor misclassification of the claimant and any other individual similarly employed as a delivery driver deemed to be in covered employment, is sustained.

(Appeal Board No. 603663 and)

The claimant is credited with remuneration from the employer regarding the claim for benefits effective February 12, 2018. (Appeal Board No. 603662 and 118-05476)

The employer is liable with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER